
General Counsel's Supplemental Report

January 1, 2005 – March 31, 2005

Public Employment Relations Commission

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| Appeals From Commission Decisions |
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| Unfair Practice Cases |
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An Appellate Division panel has affirmed the finding of an unfair practice in *Irvington Bd. of Ed. and Irvington Ed. Ass'n*, P.E.R.C. No. 2003-83, 29 *NJPER* 218 (¶65 2003), aff'd __ *NJPER* __ (¶ __ 2005), App. Div. Dkt. No. A-005244-02T3 (1/19/05). The Commission held that the Board discriminatorily refused to appoint an employee to a stipended position on a curriculum committee in retaliation for her Association leadership in several capacities. The Court accepted the Commission's findings and inferences and deferred to its evaluation of the evidence.

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| Scope-of-Negotiations Cases |
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An Appellate Division panel has affirmed the Commission's decision in *Waldwick Bd. of Ed. and Waldwick Ed. Ass'n*, P.E.R.C. No. 2004-61, 30 *NJPER* 104 (¶41 2004), aff'd __ *NJPER* __ (¶ __ 2005), App. Div. Dkt. No. A-004477-03T5 (3/17/05). The Court agreed with the Commission that negotiation over extended sick leave for school board employees is preempted by *N.J.S.A. 18A:30-6*, a statute requiring that extended sick leave be granted "for such length of time as may be determined by the board of education in each individual case." *Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n*, 152 *N.J. Super.* 235 (App. Div. 1977), held that this statute requires case-by-case determinations and prohibits a negotiated rule and the Court

rejected the Association's arguments seeking to have *Piscataway* overruled.

Commission Regulations

The Commission has adopted an amendment to *N.J.A.C.* 19:16-5.1 increasing the fees to be paid to interest arbitrators and has readopted with minor amendments its rules governing contested transfer cases, *N.J.A.C.* 19:18. The Commission has also proposed readoption with minor amendments of its subchapters on unfair practice and representation rules, *N.J.A.C.* 19:11 and 19:14.

Other Court Cases

Grievance Arbitration

1. Decisions Confirming Awards

In *Brentwood Medical Associates v. United Mine Workers of America*, 2005 *U.S. App. LEXIS* 1415 (3d Cir. 2005), the Third Circuit Court of Appeals upheld an award sustaining a bumping grievance even though the arbitrator's decision inexplicably cited seniority/bumping language that could not be found in the collective bargaining agreement. The Court concluded that the arbitrator's

reasoning on other grounds could still support the award. A dissenting opinion would have vacated the award because the error violated a clause prohibiting an arbitrator from adding to or modifying the agreement.

2. Decisions Vacating Awards

In *City of Paterson v. Paterson Police PBA Local 1*, App. Div. Dkt. No. A-5759-03T5 (3/16/05), the Court affirmed a trial court decision vacating an award. The arbitrator found that the City violated the parties' past practice clause and contractual duty to discuss major changes when it stopped paying detective stipends to police officers who were not detectives and when it stopped paying night shift premiums to officers who did not engage in night shift work. The trial and appellate courts concluded, however, that the provisions relating to detectives and night differentials clearly prohibited payments to officers who were not detectives or did not work on the night shift.

The Appellate Division's opinion incorrectly stated that the Uniform Arbitration Act, *N.J.S.A.* 2A:23B-1 through 32, had replaced the previous arbitration act governing labor relations cases, *N.J.S.A.* 2A:24-1 *et seq.* The Uniform Arbitration Act, however,

exempts arbitrations arising under collective negotiations agreements. *N.J.S.A. 2A:23B-3*. The previous arbitration act remains good law for such disputes. *N.J.S.A. 2A:24-1.1*.

3. Contractual Arbitrability Cases

In *Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Ass'n*, App. Div. Dkt. No. A-2435-03T2 (1/24/05), the Court held that a dispute over a teacher's effective date of termination was not contractually arbitrable. The parties' arbitration clause was limited to disputes arising under the collective negotiations agreement and the grievance relied solely on termination provisions in the teacher's individual employment contract.

4. Other Arbitration Decisions

In *Wilde v. O'Leary*, 374 *N.J. Super. LEXIS* 583 (App. Div. 2005), an Appellate Division panel vacated an award issued pursuant to the NASD Code of Arbitration Procedure. The Court held that the arbitration panel committed misconduct under *N.J.S.A. 2A:24-8* when it refused to grant plaintiff an extension of time to retain a new expert after defendants strategically waited until plaintiff's expert was presented at hearing before making their motion to preclude his testimony. Given

that plaintiff was required to arbitrate her claim before an industry-controlled panel, the arbitrators had to provide a fair forum and respect fundamental due process.

Hiring

In *re Hruska*, 2005 *N.J. Super. LEXIS* 47 (App. Div. 2005), held that the Borough of Carteret improperly excluded a candidate from consideration for a paid firefighter position based on an unannounced threshold qualification of being an active firefighter. The candidate was one of the top three candidates for the civil service position, but was twice passed over for hiring based on the unannounced qualification. While it was not illegal for the Board to use active volunteer service in differentiating between candidates on merit and fitness grounds, it was illegal to exclude a candidate from comparison with other candidates based on a secret eligibility requirement.

Bi-State Agencies

Judge Garry J. Furnari, J.S.C. of the Essex County Superior Court has affirmed a decision of the Port Authority Employment Relations Panel. In *re Alleged Improper*

Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction; IP 97-28 v. Port Authority Employment Relations Panel, Dkt. No. ESX-L-1897-01 (1/21/05), app. pending, App. Div. Dkt. No. A-3134-04T2. The Panel held that the Port Authority violated its Labor Relations Instruction when it unilaterally transferred negotiations unit work from police officers employed by the Authority to security guards employed by a subcontractor. The unit work consisted of performing traffic control functions outside the International Arrivals Building at JFK and certain security functions both within and outside that building. The Court deferred to the Panel's expertise in applying the Labor Relations Instruction to the facts and legal arguments.

Agency Immunity

Judge Pisano of the United States District Court has dismissed a Complaint filed by a former court reporter employed by the Administrative Office of the Courts against 44 named defendants, including several unions and union attorneys, several judges, the Commission, and the Attorney General. *Yuhasz v. Leder*, Civ. Action No. 04-1508 (JAP). The 332-paragraph Complaint

contested a 1995 job transfer and subsequent termination and was the eighth lawsuit Yuhasz had filed contesting these actions. The Court concluded that the Complaint was barred on several grounds, including res judicata, the entire controversy doctrine, timeliness, and failure to state a claim upon which relief could be granted. The Court specifically held that the Eleventh Amendment to the United States Constitution barred a federal court action against the Commission absent the State's consent and that in any event, her claims lacked a factual basis and were untimely. The Court also ordered Yuhasz to show cause why she should not be barred from filing future Complaints based on the same matters without obtaining leave of court.

Probation Officers

An Appellate Division panel has declared unconstitutional a statute establishing a "Probation Officer Community Safety Unit" and authorizing probation officers in that unit to carry firearms; arrest, detain and transport probationers; and enforce the criminal laws of New Jersey. *In re P.L. 2001, Chapter 362*, 2005 N.J. Super. LEXIS 59 (App. Div. 2005). Applying principles set forth in *Passaic Cty. Probation Officers' Ass'n v. Passaic Cty.*, 73

N.J. 247 (1977), the Court held that the Act infringes on the plenary constitutional authority of the Supreme Court to make rules concerning the administration of the courts. The Court rejected an argument that the Judicial Employees Unification Act, *N.J.S.A.* 2B:11-1, vitiated *Passaic Cty.*; that Act permits negotiations over grievance procedures and health and safety issues, but does not authorize statutes directly interfering with the Supreme Court's plenary constitutional prerogatives. The Court also rejected an argument that the Judiciary was required to arbitrate its constitutional arguments pursuant to the parties' collective negotiations agreement. It reasoned that arbitrators cannot declare statutes unconstitutional; the dispute was not contractually arbitrable; and the Judiciary had a managerial prerogative to make policy concerning the arming of probation officers, their law enforcement status, and their training.

Age Discrimination

In *Smith v. City of Jackson*, __ *U.S.* __ (2005), the United States Supreme Court concluded that personnel actions may violate the federal Age Discrimination in

Employment Act if they have a disparate impact on employees over 40 years old even if they were not motivated by a discriminatory intent. However, the Court dismissed a Complaint alleging that the City of Jackson violated the ADEA when it adopted a pay plan that gave greater percentage raises (but not necessarily greater dollar amount raises) to officers with less seniority and lower rank positions. While this pay plan did have a disparate impact, it was permissible because it was based on a “reasonable factor other than age.” That factor was the City’s goal of raising the salaries of employees in lower echelons to match those in surrounding communities so as to be better able to recruit and retain new employees.